Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

May 19, 2000

GSBCA 15207-RELO

In the Matter of THOMAS E. CASEY

Thomas E. Casey, Concord, MA, Claimant.

C. Bruce Sheaffer, Comptroller, National Park Service, Accounting Operations Center, Reston, VA, appearing for Department of the Interior.

WILLIAMS, Board Judge.

At issue in this claim is whether claimant is entitled to reimbursement for relocation benefits for his common law spouse. The agency denied benefits because claimant had not submitted sufficient evidence that a common law marriage existed. We agree with the agency. The applicable state law, that of Pennsylvania, requires clear and convincing evidence of the creation of a common law marriage, and claimant has not met his burden of proof.

Claimant also seeks reimbursement of a home inspection fee and a radon test fee in connection with his purchase of a residence. We deny reimbursement because claimant has not established that these types of expenses were customarily paid by purchasers in the location or were required by law or the lender.

Background

Claimant, Thomas E. Casey, an employee of the National Park Service (NPS), Department of the Interior, was transferred from Jewel Cave National Monument (NM), Custer, South Dakota, to Minute Man National Historical Park (NHP), Concord, Massachusetts, in April 1999. The travel authorization approved reimbursement of permanent change of station expenses including full reimbursement for his common law spouse, G.S.

However, the agency deducted $892.02 from the requested relocation benefits representing mileage, per diem, and miscellaneous moving expenses attributable to the common law spouse on the ground that claimant did not submit sufficient legal evidence that

a common law marriage existed. The agency admits, however, that Mr. Casey would be entitled to reimbursement of all of these expenses if Ms. S.

Claimant submitted two letters from family members, both dated November 23, 1998, stating the following:

> I the undersigned hereby acknowledge the following:
>
> 1. There exists an express agreement between Thomas E. Casey and [G.S.] whereby they have assumed a relationship of husband and wife and recognized by the State of Pennsylvania to be a Common Law Marriage.
>
> 2. They hold themselves out in evidence to friends, family, and the government as a married couple.
>
> 3. Their agreement became effective as of November, 1991 when they entered into a condition of cohabitation in the State of Pennsylvania.
>
> 4. Their cohabitation and reputation as such continues to the present while residing in the State of South Dakota.

In further support of his claim, Mr. Casey states:

> [T]he spouse resigned her position with the US Forest Service, Cave Junction, OR in 1991 and moved to Valley Forge NHP, Valley Forge, PA, to cohabitate [sic] and reside in a declared state of common-law marriage with the employee in his NPS residence. The common-law marriage was established in PA, a state that recognizes common-law marriages. The spouse in 1992 moved with the employee to Jewel Cave NM, Custer, SD maintaining the common-law marriage. The spouse again in 1999 moved with the employee to Minute Man NHP, Concord, MA maintaining the common-law marriage. For the eight plus years we have maintained a home, relatives, friends, coworkers, and NPS management have always regarded us as being in a spousal relationship. Affidavits provided by family members attest to our claim.
>
> [The] NPS Human Resources Division (HRD) recognized as proof in 1998, the evidence of common-law marriage status submitted by the employee per their [sic] acceptance of the spouse for enrollment in a family plan for federal health benefits.
>
> [The] NPS Division (HRD) . . . recognized and confirmed the spousal relationship, and inculcated [sic] to the employee that fact.

Discussion

As we recognized in James H. Perdue, GSBCA 14122-RELO, 98-1 BCA ¶ 29,674, the burden of proof is on the claimant to establish his common law marriage. Issues of marital status are determined by state law, and the relationship of spouse exists if common law marriage is recognized under the law of the state where the parties entered into such a

marriage. Perdue, 98-1 BCA at 146,984, citing Stephen P. Atkinson, B-260688 (Oct. 23, 1995); Connie P. Isaac, B-247541 (June 19, 1992).

Claimant contends that he entered into a valid common law marriage in Pennsylvania some eight years prior to his transfer. Marriage in Pennsylvania is a civil contract by which a man and a woman take each other for husband and wife. Staudenmayer v. Staudenmayer, 562 Pa. 253, 714 A.2d 1016 (1998). Pennsylvania recognizes common law marriage. 23 Pa.C.S.A. § 1103 (1999); DeMedio v. DeMedio, 257 A.2d 290, 215 Pa. Super. 255 (1969). In Pennsylvania a "common law marriage can only be created by an exchange of words in the present tense, spoken with the specific purpose that the legal relationship of husband and wife is created by that." Staudenmayer, citing Commonwealth v. Gorby, 527 Pa. 98, 110, 588 A.2d 902, 907 (1991).

The Pennsylvania courts do not readily accept claims of common law marriage; as the Pennsylvania Supreme Court explained: "Pennsylvania courts have long viewed claims [of common law marriage] with hostility . . . . Common law marriages are tolerated but are not encouraged . . . . [W]hile we do not today abolish common law marriages in Pennsylvania, we reaffirm that claims for this type of marriage are disfavored." Staudenmayer, 714 A.2d at 1019-20. The Staudenmayer court further characterized the burden to prove a common law marriage as heavy. Id. at 1020. Finally, the court noted that "when an attempt is made to establish a marriage without the usual formalities the claim must be reviewed with 'great scrutiny.'" Id. The Pennsylvania courts have addressed the evidentiary requirements for establishing a common law marriage as follows:

> [T]he law has created or raised a rebuttable presumption of marriage where two absolutely essential elements are conjoined and coexist: constant, as distinguished from an irregular or inconstant, cohabitation, plus reputation of marriage, which is not partial or divided but is broad and general. Manfredi Estate, 399 Pa. 285, 291, 159 A.2d 697, 700 (1960). Cohabitation and reputation, however, "do not create the marriage but rather are circumstances giving rise to a rebuttable presumption of one." Wagner Estate, 398 Pa. 531, 533, 159 A.2d 495, 497 (1960); Manfredi Estate, supra 399 Pa. at 291, 159 A.2d at 700; Nikitka's Estate, 346 Pa. 63, 29 A.2d 521 (1943). Moreover, "the rule which permits a finding of marriage duly entered into based upon reputation and cohabitation alone is one of necessity to be applied only in cases where other proof is not available." Nikitka's Estate, [346 Pa. 63] at 65, 29 A.2d at 522 (1943).

In re Estate of Rees, 480 A.2d 327, 331, Pa. Super. 225 (1984). In particular,

> [W]hen the parties are available to testify, the burden rests with the party claiming a common law marriage to produce clear and convincing evidence of the exchange of words in the present tense spoken with the purpose of establishing the relationship of husband and wife, in other words, the marriage contract. In those situations, the rebuttable presumption in the favor of a common law marriage upon sufficient proof of constant cohabitation and reputation for a marriage, does not arise.

Staudenmayer, 714 A.2d at 1021.

Accord, Commonwealth v. Sullivan, 398 A.2d 978 (1979) (no common law marriage where agreement was to marry in the future; cohabitation and reputation could not establish marriage if the requisite contract was not entered into); Torres v. Com. Dept. of Public Welfare, 393 A.2d 1079 (1978); Bowden v. Workmen's Compensation Appeal Board, 376 A.2d 1033 (1977) (present intent of parties to form a marriage contract is the crucial element in proving a valid common law marriage).

The record in this case contains sparse evidence of claimant's common law marriage -- consisting solely of unsworn statements by claimant himself and two family members. These statements assert that claimant and Ms. S. cohabited continuously for eight years, that the reputation of marriage was broad and general, and that "there exists an express agreement between [claimant and Ms. S.] whereby they have assumed the relationship of husband and wife." Claimant also states that he was authorized by the Government to receive federal health benefits for his common law spouse and that his travel authorization listed her as his spouse. However, there is no independent documentary evidence such as mail addressed to each at the same address, drivers' licenses, joint tax returns, or joint financial or credit accounts supporting the fact that the common law marriage was entered into in Pennsylvania and continued in the subsequent domiciles. Nor is there any statement in the record by the common law spouse to the effect that she entered into a marriage contract in Pennsylvania. Nor is the "express agreement" itself in the record. Such independent documentary evidence to support claimant's common law marriage claim should be readily available, yet claimant failed to submit any such evidence even though the agency requested it.

In James H. Perdue, where the Board found a common law marriage existed under the law of Alabama, the claimant submitted extensive documentation including a formal written agreement between him and his common law spouse, as well as documentation of their addresses, a contract of sale and warranty deed, a lease, checks covering joint expenses, and a photograph showing the couple wearing wedding rings. While the type of documentary evidence need not be exactly what it was in Perdue, claimant must submit clear and convincing proof of the creation of the common law marriage in Pennsylvania and its continuation in order to meet his heavy burden of proving the existence of a common law marriage under Pennsylvania law.

Based on the record before us, we conclude the agency properly denied spousal benefits for lack of sufficient evidence of a common law marriage. Cf. Kathy B. Schumer, GSBCA 14531-RELO, 98-2 BCA ¶ 29,863 (evidence insufficient to establish common law marriage).

Also at issue is $145 for a home inspection and $40 for home radon testing incurred in connection with claimant's purchase of a residence at the new duty station. In support of his claim for these costs, Mr. Casey submitted a letter from St. Mary's Credit Union in Marlborough, Massachusetts, dated October 8, 1999, stating, in pertinent part:

> I am writing in regard to your question of what are customary fees for purchasing a house in this area.

> Probably the most important fee is the home inspection. . . . I cannot think of anyone who was buying a house that did not have an inspection done before signing a formal purchase and sale agreement.
>
> This part of the country is unique to having radon problems and many buyers in this area would not consider buying a home without having a radon test done. Many people in this area don't even realize that they have a problem until a test is done by an impartial third party.
>
> I would say that both of these procedures are necessary for peace of mind and are common to this area before purchasing a house.

This letter was signed by the loan officer at the credit union.

As we recognized in David P. Brockelman, GSBCA 14604-RELO, 98-2 BCA ¶ 29,971, applicable regulations provide that environmental testing expenses and property inspection fees are reimbursable when required by state, federal, or local law or by the lender as a precondition to the sale or purchase. 41 CFR 302-6.2(d)(1)(xi) (1997). The regulations also make clear that these expenses are reimbursable in connection with the purchase of a residence only if they are customarily paid by the purchaser of a residence at the new official station. Id. In this case, the letter from claimant's credit union does not establish either that the fees were customarily paid by the purchaser in the location or that the home inspection fee or the radon testing fee were required by state or local law or the lender as a condition of financing. As such, Mr. Casey has failed to demonstrate entitlement to the reimbursement of these fees. Accord, Brockelman; Elizabeth L. Atkeson, GSBCA 14223-RELO, 98-1 BCA ¶ 29,396; John C. Kathman, B-248906 (Nov. 18, 1992) (radon inspection was not required by lender as a precondition for financing or imposed by state or local law, and, therefore, was not reimbursable); Larry E. Harrison, B-242946 (June 12, 1991) (radon test was for employee purchaser's own personal benefit and not customarily paid by purchasers).

Decision

The claim in its present posture is denied.

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MARY ELLEN COSTER WILLIAMS
Board Judge